Supervalu, Inc. *and* Irish Johnson. Case 26–CA–21274

June 13, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 28, 2004, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Respondent filed a brief in opposition to the General Counsel's exceptions; and the General Counsel filed a reply brief to the Respondent's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

Introduction

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by refusing to reinstate 36 strikers who walked off the job in protest of the Respondent's implementation of a production and tracking system and other economic issues. The judge found that the Respondent did not act unlawfully when it refused to reinstate the strikers because the Respondent had permanently replaced all of them before any striker made an unconditional offer to return to work. We adopt the judge's finding that the Respondent's refusal to reinstate 33 of the 36 strikers did not violate Section 8(a)(1). With respect to 3 of those 33 strikers—full-time employees Will Hampton, Steve Lyons, and Elvis Lyons—we note that, even though they made unconditional offers to return to work when the Respondent was still in the process of hiring permanent replacements, the record reflects that they had been permanently replaced as full-time employees before they made unconditional offers to return to work, and they declined part-time employment. As to the remaining three strikers—part-time employees Leslie Hall, Melvin Norris, and Reggie Crawford—who also made unconditional offers to return to work when the Respondent was still in the process of hiring permanent replacements, the record reflects that these individuals *had not* been permanently replaced as part-time employees when they made unconditional offers to return to work. Thus, contrary to the judge, we find that the Respondent violated Section 8(a)(1) by refusing to reinstate Hall, Norris, and Crawford.[2] These issues are discussed below.[3]

Facts

The Respondent, a grocery distributor with headquarters in Minneapolis, Minnesota, maintains a distribution center in Indianola, Mississippi. On Thursday, June 19, 2003,[4] 36 warehouse employees at the Indianola facility engaged in a walkout in protest of the Respondent's implementation of a production and tracking system and other economic issues.

The next day, Friday, June 20, the Respondent decided to permanently replace the strikers. That morning, the Respondent permanently replaced the 25 full-time employee strikers by promoting 25 part-time employees into the strikers' full-time positions. In addition, throughout the day, the Respondent hired a total of 52 part-time permanent replacements to replace the part-time employee strikers and to fill any vacancies that resulted from the promotion of the part-time employees into full-time positions.

That afternoon, while the Respondent was still in the process of hiring the part-time permanent replacements, six strikers—full-time employees Will Hampton, Steve Lyons (S. Lyons) and Elvis Lyons (E. Lyons), and part-time employees Leslie Hall, Melvin Norris, and Reggie Crawford—returned to the Respondent's facility and made unconditional offers to return to work.[5] When they

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to his colleagues, Member Schaumber would not order a remedy for Hall, Norris, or Crawford based on these circumstances. He finds that, even assuming that they had not been permanently replaced by the time that they unconditionally offered to return to work, any technical violation was isolated and de minimis, and in any event was cured the following morning. He notes that the Respondent had already covered the relatively light amount of work available on the June 20 shift by the time Hall, Norris, and Crawford offered to return to work, and by June 21 had made a valid offer of work to these employees.

[3] In the absence of exceptions, we adopt pro forma the judge's findings that the Respondent did not violate Sec. 8(a)(1) by: telling an employee that his job would be in jeopardy if he participated in the strike; telling an employee that another employee might be fired for participating in the strike; and telling an employee that he would not have a job if he participated in the strike.

[4] All dates herein refer to 2003 unless otherwise noted.

[5] The record reflects that, at the time the six strikers named above returned to the Respondent's facility, the Respondent had already promoted the 25 part-time employees into full-time positions, and it had hired about 13 of the part-time permanent replacements. Thus, there were still about 39 part-time positions open when the strikers returned.

arrived at the facility, they met with General Manager Ben Gaston in a conference room. Although there is some ambiguity in the record regarding what was said during this meeting, the Respondent concedes, and the judge found, that Gaston told all six strikers that they had been permanently replaced. Gaston also asked the strikers whether they would be interested in part-time employment if positions became available. Full-time employees Hampton, S. Lyons, and E. Lyons replied that they would not be interested in part-time employment, and they left the facility. Part-time employee Crawford stated that he would be interested in a part-time position. Although there is some ambiguity in the record regarding the responses of Hall and Norris, it appears that they also expressed an interest in part-time employment. Thus, Gaston told Hall, Norris, and Crawford that he would contact them as soon as part-time positions became available, and they left the facility.

Early the next morning, Saturday, June 21, Gaston called Hall, Norris, and Crawford to offer them part-time positions beginning Sunday, June 22; both Hall and Norris accepted the offers.[6]

On Saturday and Sunday, June 21 and 22, after the Respondent had completed the process of permanently replacing the strikers, most of the remaining strikers returned to the Respondent's facility and made unconditional offers to return to work. Upon their arrival, the strikers were instructed to meet with Gaston in the conference room. For unknown reasons, Hall and Norris, who came to the Respondent's facility on June 22 to begin their new part-time assignments, followed the strikers returning to the facility that day into the conference room, where Gaston told the strikers that they had been permanently replaced and dismissed them. Without speaking to Gaston or any other official of the Respondent, Hall and Norris left the facility with the other strikers and did not report to work.[7]

The record reflects that, in the months following the strike, the Respondent offered reinstatement to all 36 strikers when positions became available. Most of those individuals have since returned to work for the Respondent.[8]

Analysis

It is well established that, in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs upon making an unconditional offer to return to work. See *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970) (citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967)). One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that their jobs are occupied by workers hired as permanent replacements. *Fleetwood*, 389 U.S. at 379. The burden of proving this justification is on the employer. Id. at 378.

Applying those principles here, we find, for the reasons stated by the judge, that the Respondent has established that 33 of the 36 strikers—including full-time employees Will Hampton, Steve Lyons, and Elvis Lyons—had been permanently replaced before they made unconditional offers to return to work. Thus, we adopt the judge's finding that the Respondent's initial refusal to reinstate these strikers was not unlawful. Although, as discussed above, Hampton, S. Lyons, and E. Lyons made unconditional offers to return to work on the afternoon of June 20, when the Respondent was still in the process of hiring part-time permanent replacements, we note that, by the time they returned to the Respondent's facility, the Respondent had already filled all of its full-time positions by promoting part-time employees into those positions. Accordingly, the Respondent lawfully informed Hampton, S. Lyons, and E. Lyons that they had been permanently replaced as full-time employees. And, when the Respondent asked them whether they were interested in part-time positions, all three replied that they were not. In these circumstances, we find, in agreement with the judge, that the Respondent's refusal to reinstate Hampton, S. Lyons, and E. Lyons was not unlawful.[9]

On the other hand, we find, contrary to the judge, that the Respondent's refusal to reinstate the remaining three strikers—Leslie Hall, Melvin Norris, and Reggie Crawford—*was* unlawful. As noted above, Hall, Norris, and

The hiring of the 52 part-time permanent replacements was not completed until about 9 p.m. that evening.

[6] The judge found that the Respondent also attempted to contact Crawford, but was unable to do so because the contact information in Crawford's personnel file was incorrect.

[7] There is no credible evidence in the record that any official instructed Hall and Norris to go to the conference room with the other strikers rather than report to work. Gaston testified that he noticed Hall and Norris in the meeting, but he assumed that they would report to work following the meeting.

[8] The record reflects that Norris and Crawford were working for the Respondent at the time of the hearing in this case; Hall testified that he was unable to work for the Respondent due to a medical condition.

[9] However, in reaching this finding, we do not rely on the judge's finding that, even though the Respondent had not yet completed its hiring of part-time permanent replacements when Hampton, S. Lyons, and E. Lyons made unconditional offers to return to work, the Respondent was not required to reinstate them because, at that point in the day, the Respondent had already hired more permanent replacements than there were strikers. That finding was incorrect. See fn. 5, supra.

Crawford also made unconditional offers to return to work on June 20, when the Respondent was still in the process of hiring part-time permanent replacements. However, Hall, Norris, and Crawford were *part-time* employee strikers, and, thus, the Respondent has failed to show that these individuals had been permanently replaced when they made unconditional offers to return to work. In this regard, the record reflects that, when Hall, Norris, and Crawford arrived at the Respondent's facility on the afternoon of June 20, there were still about 39 open part-time positions for which the Respondent had not yet hired permanent replacements. In view of these circumstances, we find that the Respondent's refusal to reinstate Hall, Norris, and Crawford upon their unconditional offers to return to work violated Section 8(a)(1).[10]

REMEDY

Having found that the Respondent violated Section 8(a)(1) by refusing to reinstate Leslie Hall, Melvin Norris, and Reggie Crawford upon their unconditional offers to return to work, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[11]

We shall order the Respondent, inter alia, to make Hall, Norris, and Crawford whole for any loss of earnings and other benefits. Backpay shall be computed from June 20, 2003, the date of the Respondent's unlawful refusal to reinstate Hall, Norris, and Crawford, to June 21, 2003, the date of the Respondent's offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Supervalu, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers to existing vacancies upon their unconditional offers to return to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Leslie Hall, Melvin Norris, and Reggie Crawford whole for any loss of earnings and other benefits they have suffered as a result of the unlawful refusal to reinstate them, in the manner set forth in the remedy section of this decision.

(b) Preserve, and within 14 days of a date of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Indianola, Mississippi, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] Nevertheless, we agree with the judge that the Respondent did not act improperly when it failed to speak with Hall and Norris to clarify their employment status after they left the Respondent's facility and failed to report to work on June 22.

[11] In light of the Respondent's offers of reinstatement to Hall, Norris, and Crawford, and given that Norris and Crawford subsequently returned to work for the Respondent, it is not necessary to order a reinstatement remedy.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 13, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal Labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to reinstate economic strikers to existing vacancies upon their unconditional offers to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL make Leslie Hall, Melvin Norris, and Reggie Crawford whole for any loss of earnings and other benefits they have suffered as a result of our unlawful refusal to reinstate them, less any net interim earnings, plus interest.

SUPERVALU, INC.

Tamra Sikkink and *William Lemaster, Esqs.*, for the General Counsel.

Henry T. Arrington and *Richard Hammond, Esqs.*, for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 26—CA—21274 was filed by Irish Johnson, an individual (Johnson) on June 30, 2003,[1] and later amended on August 26, 2003. Based upon the original and the amended charge, the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on August 29, 2003. The original complaint alleges that Supervalu, Inc. (Respondent) violated Sections 8(a)(1) of the National Labor Relations Act (the Act) by failing and refusing to reinstate 33 employees[2] who ceased work concertedly and engaged in a strike for their scheduled shift on June 19, 2003. The complaint also alleges that on June 19, 2003, Respondent acting through Ben Gaston, telephonically told an employee that if the employee participated in the strike, the employee's job was in jeopardy. The original complaint further alleges that on June 19, 2003, Respondent, acting through Barry Dickerson, telephonically told an employee that if the employee participated in the strike, the employee would not have a job.[3] The complaint further alleges that on June 20, 2003, Respondent acting through Chris Thompson, telephonically told an employee that another employee was fired because Respondent had seen the other employee on television with other employees who had ceased work concerted. Respondent filed a timely answer on September 8, 2003, denying the violations as alleged.

A hearing on these matters was conducted before me in Greenville, Mississippi on March 10, 11, 12, and 31 as well as on April 1 and 2, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with headquarters in Minneapolis, Minnesota, maintains a distribution center in Indianola, Mississippi where it is engaged in the distribution of food, pharmaceutical, and general merchandise to grocery retailers. Annually, Respondent sells and ships from its Indianola, Mississippi facility goods valued in excess of $50,000 directly to points located outside the State of Mississippi. During the same time period, Respondent purchases and receives at its Indianola, Mississippi facility goods valued in excess of $50,000 directly from points located outside the State of Mississippi. Respondent admits, and

[1] All dates are in 2003 unless otherwise indicated.

[2] By motion of March 10, 2004, the complaint was amended to add three additional strikers.

[3] Due to the unavailability of this witness, no evidence was presented in support of this allegation. The undersigned granted Respondent's motion for dismissal of this complaint allegation.

I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

Respondent's Lewis Grocer Division is located in Indianola, Mississippi, and is one of Respondent's four nonunionized divisions. Twenty-four of Respondent's 28 divisions are unionized. At all times relevant to this proceeding, Ben Gaston has been the general manager for the Indianola Mississippi distribution center. Having the position of highest authority at the Indianola facility, Gaston reports to Regional Vice-President of Logistics Matt Smith in Respondent's office in Kenosha, Wisconsin. Warehouse Manager Barry Dickerson, Transportation Manager Arnold Hamilton, and Human Resources Director Harry Davis report directly to Gaston and share equal authority at the facility. At all relevant times, Frank Gardner was receiving superintendent and David Campbell was shipping supervisor. Both reported directly to Barry Dickerson. At all relevant times, Christopher Thompson has been a warehouse labor analyst. Thompson testified that this position is a management position.

In June 2003, 218 of Respondent's 300 Indianola distribution center employees worked in the warehouse.[4] It is undisputed that Respondent's busiest shifts of the week are Thursday and Sunday evenings because Respondent's customers want their products fully stocked on Fridays and Mondays. All employees are normally scheduled to work on these two shifts. Order selectors and forklift operators for the shipping department report to work at 2:30 p.m. on Thursdays and at 12:30 p.m. on Sundays. Loaders report to work at 3 p.m. on Thursdays and at 2 p.m. on Sundays.

Prior to June 2003, Respondent implemented a new production and tracking system that is identified as a "Non-order selector" system or NOS. Gaston testified that the new system was necessary for Respondent and its retailers to compete with their major competitor in the market. The new system was met with resistance from some of Respondent's employees because it included specific standards for production. In order to deal with the employees' resistance, Gaston and other management personnel conducted a series of meetings concerning the system with the employees.

2. The events of June 19

Irish Johnson has been employed with Respondent for the past 14 years and has been a forklift operator for the last 3 years. While it was Johnson's practice to clock in around 2:25 or 2:30 p.m. each day, he arrived at the warehouse around 2 p.m. on June 19, 2003. When he entered the building, he saw employees "sitting on the rail" in the designated smoking area and he joined the other employees. The rail is identified as a barrier imbedded in the floor to generate a walkway to warehouse offices and to block forklifts from the walkway. Johnson testified that the employees were congregated to talk with management about some problems they were having with the new system. Johnson recalled that he first heard about the employees' plan to speak with management on June 18. Employees Jerry Williams, Kelvin Cooks, Larnelle Bush, Latracy Jackson, Arthur Denton, and Terrence Harrington testified that they heard abut the plan to meet with management earlier that same week. Chauncey Hawkins testified that he heard about the planned meeting as much as a week before June 19 and Richard Howard testified that the meeting had been planned for as long as 2 weeks. No employee witness could identify who initially planned the meeting.

Prior to 2:30 p.m., Shipping Supervisor David Campbell entered the area and asked the employees what was going on. Johnson responded that the employees had some issues and they needed to see upper management. Gaston testified that when he came to work on June 19, he had been out of the office for a week and a half for his annual National Guard training. He recalled that at approximately 2:30 or 2:35, Campbell came into the office and told him that all of the employees were "sitting on the rail." Gaston recalled that Campbell reported: "We have a problem. Employees are sitting down on the rail. They want to speak to a member of upper management." Accompanied by Warehouse Manager Barry Dickerson and Human Resources Director Harry Davis, Gaston followed Campbell to the area where the employees were congregated. Seeing all of the shipping employees sitting on the rail, Gaston acknowledged to them that they had picked the heaviest night of the week to get his attention. He estimated that there were approximately 70 to 80 employees on the shipping evening shift. Gaston testified that he told the employees that he knew that they had issues with the NOS system and the excessive hours. He explained that if they had other issues as well, he would meet with them one-on-one to discuss those issues. He suggested that he would record the issues and then he could address those issues in group meetings as he had done in the past. He reminded them that they had a new customer and he explained that he didn't want any service problems with the new retailers. Gaston testified that Respondent had just obtained a new customer that could generate $34 million in business annually for the facility and that another potential customer was also considering business with Respondent. He explained to the employees that he could not meet with them as a group at that time and asked them to go back to work. He assured them that he would meet with them one-on-one and would also meet with them in groups at a later time.

Both Gaston and Johnson confirm that Gaston made three separate appeals for the employees to return to work. Employees Larnelle Bush, Marcello Young, Latracy Jackson, Arthur Denton, Steven Lyons, Darry Jackson, Willie Hull, and Leslie Hall all confirmed that Gaston gave two to three warnings to employees to go to work. Johnson testified that Gaston told employees that it was unlawful for him to speak with them as a group and that he had to speak with them one-on-one. Gaston denied that he told the employees that it was unlawful for him to meet with them as a group, explaining that he had done so when he previously met with employees in groups about the new system. Johnson testified that during the meeting he told Gaston that the employees just wanted to discuss five issues

[4] R. Exh. 116.

with him and then they could go back to work. Johnson testified that he told Gaston: "We're not striking we just want to discuss five problems and we can go to work and be out of here by 1 o'clock, no later than 1 o'clock; from 12 to 1 o'clock." Counsel for the General Counsel presented 14 employees who testified that they were present when Gaston met with the shipping employees on June 19. No other employee corroborated Johnson's testimony that he told Gaston that the employees would return to work once Gaston discussed five issues with them. On cross-examination, Johnson acknowledged that while he told Gaston that there were five issues, he did not actually learn of five issues until he and other employees left the warehouse on June 19. Employee Terence Harrington testified that Johnson told Gaston: "This is not a strike." None of the fourteen employees, with the exception of Johnson, corroborated Harrington's testimony. Gaston testified that when Johnson told him that the employees had issues, Gaston told him that he would be glad to talk about the issues on an individual basis and he suggested that he could start with Johnson. Gaston recalled that Johnson responded: "Don't single me out." Johnson corroborated Gaston and acknowledged that when Gaston offered to meet first with him, he told Gaston to start with someone else.

Gaston testified that after making the third unsuccessful appeal for the employees to go back to work, he left the area. Before leaving, he told Dickerson to give the employees a few minutes, thinking that they would return to work. Johnson recalled that Gaston told them before leaving that he would give them 2 minutes to think about it and then he left the area. Johnson recalled that Dickerson later told the employees that their 2 minutes were up and if they were not going back to work, they needed to leave the premises. Approximately one-half of the assembled employees then left the premises.

Gaston testified that emergency measures were implemented that evening to get the shipments out to the retailers. He estimated that some of their scheduled deliveries were delayed as much as 7 to 8 hours.

3. Assembly in the parking lot

Johnson testified that when the exiting employees reached the employee parking lot, they assembled together.[5] Employee Reginald Wright also met with the employees who had just walked out of the plant. Wright did not testify and no witness identified why Wright was present at Respondent's facility's as he was on suspension at the time of the walkout. Johnson recalled that he told the employees in the parking lot that Respondent might not allow him to return to work but Respondent would allow them to return to work. He recalled that he told employees that Respondent would not "let everybody just walk out on the heaviest night and not let them back in." Johnson contends however, that the employees agreed that if the Respondent did not let him back in, they weren't going back. Johnson maintained that he told them that he was going "to the house." No other employee corroborated Johnson's testimony that employees did not return to the warehouse and ultimately left the parking lot because of Johnson's statement as alleged. Employees Larnelle Bush, Latracy Jackson, and Steve Lyons testified that the employees left the parking lot because of their concerns that the police had been called. Jerry Williams testified that he left the parking lot because Dickerson told them to leave. Marcello Young testified that he was not sure why the employees left the parking lot after 5 to 10 minutes.

4. The strikers' attempts to report their absence

Respondent's attendance policy includes a portion concerning employees' absence without notification. The policy defines AWOL (absence without leave) as the employee's failure to "properly notify the appropriate supervision in *advance* (before scheduled time to report to work)." The policy further provides: "if the employee can establish, after-the-fact, to the company's satisfaction that circumstances beyond their control prevented them from providing such notification, the absence will not be counted AWOL. The company's answering machine is available 24 hours a day, number: 887–8291."

Johnson testified that on his way home from the plant, he stopped at the Double Quick convenience store to call into the plant. He heard only a portion of the recorded message before he lost the connection. He made no further attempt to call into the plant. Thirteen other strikers testified that after leaving the facility, they called the warehouse and left a recorded message that they were not able to report to work on June 19. Respondent submitted into evidence a transcript of the audio recording from Respondent's answering machine for June 19. The transcript reflects that at 3:08 p.m., 19 strikers left the following message in succession: "I won't be able to make it to work today." The audio taped recording reflects that approximately 14 to 15 of the messages appear to be the voice of the same individual. Latracy Jackson testified that Reginald Wright called in for him and other strikers to prevent their being counted as AWOL. Between 3:15 p.m. and 3:56 p.m., 15 strikers left individual messages that they were not coming in to work for various reasons including sickness, car troubles, and other personal reasons. During this period of time, strikers Reggie Crawford and Kelvin Bush left individual messages in addition to the earlier message that included their names as well. Additionally, striker Darry Jackson left two separate and individual messages in addition to his inclusion in the group message recorded at 3:08 p.m.

5. The strikers congregate at the city park

Following their brief meeting in Respondent's parking lot, the strikers congregated again at the city park. Before leaving the parking lot however, Larnelle Bush spoke by telephone with a local television station. Bush recalled that it was actually Reginald Wright who telephoned the news media and then handed the phone to Bush. Employees gave varying estimates of how long they met together in the park. The majority of the employees testifying recalled that they were in the park between 2 to 4 hours. Arthur Denton recalled that he was in the park for as long as 5 hours and Larnelle Bush estimated that he remained in the park for as long as 5 to 6 hours. During the time that the employees congregated at the park, reporters from both the local newspaper and the local television station visited

[5] No striker recalled being in the parking lot for any longer than 30 minutes.

the park. Johnson testified that when he arrived at the park, the television reporter was just arriving and the newspaper reporter was already present and talking with employees. Johnson testified that he went to the park at the urging of striker Terence Harrington who came to Johnson's home after the strikers left the parking lot. Johnson testified that Harrington asked him to go to the park to calm the strikers and to talk with the media.

Chauncey Hawkins testified that he saw Reginald Wright, Richard Taylor, and Johnson giving interviews to the news media. Johnson testified that as he saw strikers speaking with the media, he saw some things that he did not like and he asked the television reporter not to show certain things. Upon further questioning, he acknowledged that the cursing and the anger in the air concerned him. Johnson recalled that Richard Taylor in particular was both cursing and crying and gave the appearance of drinking.

Johnson explained that he told the strikers that they needed a spokesman and only one person to speak on their behalf to the media and to management. Although there were initially three individuals under consideration for spokesperson, Johnson was eventually selected. Other strikers corroborated that Johnson was selected as their spokesperson during their meeting in the park. Johnson testified that while the strikers were in the park on June 19, there were discussions about when they should return to work. Johnson testified that he told the strikers that Respondent would not fire all of them and they should return to work on their next scheduled work shift. Strikers Marchello Young, Latracy Jackson, Arthur Denton, Johnny Watkins, Richard Howard, Chauncey Hawkins, and Leslie Hall corroborated Johnson's testimony. Steven Lyons testified that he did not hear any discussion about the strikers going back to work on their next scheduled workday. Melvin Norris recalled that Johnson told strikers to go back if they were called in to work.

It is undisputed that the walkout was featured as the WXVT Delta News' exclusive top story on the 10 p.m. news on June 19. News reporter Kelly McCullen reported: "Second shift warehouse workers at Indianola's Supervalu are angry. They say management is poor and a new system tracks them like robots and measures their productivity. They all say it actually hurts their efficiency, costs them production quotas and incentive bonuses. They walked out in protest, Thursday." During the same news segment, Irish Johnson stated; "We're willing to work . . . we're willing to work . . . under their system as long as it's fair. . . ." Reginald Wright stated: "We're tired of getting this stuff shoved down our throats. We tried to talk to them today. We tried to talk to them on numerous occasions. But they don't want to listen." Richard Taylor is featured during the segment as saying: "Well, they tell about all the millions of dollars they make. Then when the time comes for a raise, they want to give us a quarter. What can you do with a quarter? Try giving your kid a quarter." During the news segment Reginald Wright also appeared on camera to state: "If we're fired I've still got 40 more guys right here behind my back. If I don't go, they don't go." Indianola Mayor Arthur Marble was also interviewed during this same news broadcast. Mayor Marble stated: "I've got to try and contact some representatives from Supervalu see if we can't get this thing to the table and resolve it quickly."

Strikers Harrington and Hawkins admitted that strikers did not tell the media that they were planning on returning to work the next day. Strikers Williams and Bush both viewed the evening news coverage concerning the walkout. Both acknowledged that they did not hear anyone tell the news reporters that they intended to go back to work the next day. Richard Howard testified that no one told either the media or Respondent that they had decided to go back to work on their next scheduled work day.

6. Complaint paragraph 10

Complaint paragraph 10 alleges that on June 19, 2003, Respondent, acting through Ben Gaston, by telephone, told an employee that if the employee participated in the strike, the employee's job was in jeopardy. General Counsel presented its evidence in support of this allegation through the testimony of strikers Larry Green, Darry Jackson, and Terence Harrington. Larry Green testified that he had worked for Respondent for 18 years. At the time of the walkout, he was working as a loader on second shift. When Green and Marchello Young reported to work around 2:45 p.m. on June 19, Green saw employees "pouring" out of the warehouse. They both left the premises without entering the warehouse. Once he was home, Green called into work and reported on the answering machine that he would not be coming in to work. After Green arrived home, Terence Harrington, Darry Jackson, and Anthony Jackson visited him. Green testified that after he returned home, he received two telephone calls from Respondent's facility. The first call was from his brother who worked as a lead man on the dock and the second call was from Gaston. Green recalled that Gaston told him that he needed him to come into work. When Green declined, Gaston remarked that he had been with the company for a long time. Green testified that Gaston told him that if he didn't come in, he could jeopardize his job and Gaston would consider him as one of those who walked off. Harrington testified that he was present during Gaston's call and he overheard Green ask Gaston: "How can you consider me a part of them?" Harrington further recalled that Green told Gaston that he had called in and followed the rules and that Green told Gaston that he should just "talk with them." On direct examination, Harrington testified that Green reported to him that Gaston stated: "You've been here a lot of years. We hate to lose you like this." On cross-examination, Harrington acknowledged that while Green questioned Gaston as to how he could consider him to be a part of the walkout, he had not heard Green say anything about his "job in jeopardy." Darry Jackson testified that he overheard Green tell Gaston "How can you say that I've put my job in jeopardy when I went through procedures?" Jackson recalled that Green told Gaston that Gaston needed to talk with the guys and he (Green) was not coming in. On cross-examination, Jackson admitted that when he gave a sworn affidavit to the Board Agent in July 2003, he did not assert that Green used the word "jeopardy."

Gaston testified that he called Green around 5 or 6 p.m. on June 19. When Gaston told Green that he needed him to come into work, Green told him that he was concerned for his personal safety. Gaston told him that he nevertheless expected him to come into work. Gaston recalled that he told Green that

if he did not come into work, he would have to consider him as the others. Gaston denied that he ever told Green that his job would be in jeopardy if he didn't come in.

7. Gaston's other attempts to reach employees

It is undisputed that at approximately 6:43 p.m. on June 19, Gaston telephoned Terence Harrington at his home. The telephone message left by Gaston and recorded by Harrington's answering machine records Gaston's message as:

> Hello, Terence. This is Ben Gaston at Supervalu. I'm calling you because you called in and reported off work. I need you to come in and work. We have a significant issue out here, uhm, and I need loaders. You are scheduled to work today. I would expect you to call in, come in.
>
> You can give me a call at 887–8271 or you can call me on my cell phone, 207–2561. Again, I need you to come in to work, uh, so give me a call.

Harrington testified that he did not get Gaston's message until the following Monday, June 23, 2003. He explained that normally he does not check his voice mail and leaves that to his wife to check.

It is also undisputed that Gaston made telephone calls to Leslie Hall, Melvin Norris, and Reggie Crawford concerning their return to work. At the time of the walkout, both Hall and Norris worked as part-time order selectors. Hall recalled that Gaston telephoned him on Saturday, June 21, to ask him if he were interested in returning to a part-time position. When Hall confirmed that he was, Gaston told him to report to work the next day. Norris confirmed that he also had a message on his answering machine from Gaston, telling him to report to work on Sunday. Gaston was never able to reach Crawford because Crawford's telephone number was incorrect in Respondent's records.

8. Respondent's actions on June 19 in response to the walkout

Gaston recalled that between 3 and 9:30 p.m. on June 19, he consulted with Dickerson and Campbell. He contacted his boss before 5 p.m. to give an update. After 5 p.m. he met with Harry Davis and may have also contacted his attorney. Gaston recalled that he spoke several times with Davis concerning security and he contacted the police as he had heard rumors that the strikers would come back to cause damage. Davis testified that around 5 or 5:30 p.m., Channel 15 News Anchor Kelly McCullen came to the facility and wanted to speak with a representative of Respondent. McCullen reported to Davis that he had just returned from meeting with the strikers and he wanted to get Respondent's position and reaction. Davis told McCullen that Respondent was not only surprised but also concerned about their operations. Speaking off camera, Davis explained that Respondent was especially concerned about servicing the $30 million in new business. Because of company policy, Davis directed McCullen to the corporate headquarters for any additional information.

Gaston estimated that it was around 9:30 p.m. when he finally left the facility on June 19. After returning home, he ate and then watched the 10 p.m. news. After viewing the news segment on the walkout, he telephoned Davis to get his assessment of what he had seen on the news. Because Davis knew that the television station had been in contact with the strikers, Davis had recorded the news segment. Gaston told Davis that based upon the news story, it looked as though there was a strike and it was more significant than what he had earlier thought. Gaston told Davis that he needed to see him first thing the next morning.

9. The events of June 20

Between 7:15 a.m. and 7:30 a.m., Gaston met with Davis and Dickerson and they viewed the tape-recorded news report. Gaston recalled that he told Davis that he wanted replacement workers and directed him to check the resources. Davis recalled that Gaston told him that he needed to look at what he could do to get candidates for employment while Gaston contacted legal counsel and home office about replacing employees. Gaston testified that when he initially met with Davis and Dickerson on June 20, no decision was made about hiring permanent replacements because the decision had to be made by his boss. After a conference call including his boss in corporate headquarters and his attorney, the decision was made to hire permanent replacements for the strikers. Between 8 and 8:30 a.m., Gaston went to Davis's office and confirmed that the decision had been made to hire permanent replacements. Sometime after 8 a.m., Gaston also spoke with corporate headquarters and requested assistance from Respondent's other distribution center facilities. Throughout the weekend, supervisory personnel from six other facilities arrived at the Indianola facility to assist with training new hires and to assist with expediting delivery to customers. The outside supervisors remained at the facility for approximately 2 weeks and until the training of new employees was completed. Respondent's corporate office also negotiated a contract with a service to provide temporary service. Gaston recalled that he signed the contract on either Friday or Saturday and the first temporary employees arrived on Sunday, June 22. Gaston estimated that while 52 to 55 temporary employees reported to work the first day, the number decreased for each successive day. Davis estimated that some of the temporary employees might have worked for as long as 8 or 9 days. Respondent hired none of the individuals.

Davis contacted the state unemployment office and was told that because the state agency did not want to get involved in a labor matter, no referrals could be provided. Davis explained that he also consulted his list of individuals who had previously expressed an interest in employment. During this same time, there were calls coming in every few minutes from individuals who had seen the news program and wanted employment. Davis began setting up appointments for individuals to come in for interviews. Davis testified that the unemployment rate for the Indianola area is probably 15 to 20 percent. Because Respondent's starting wage rate is $8.55 an hour, Davis estimated that Respondent is probably in the upper 50 percent of the area's wage scale. Davis further estimated that he might normally have to interview an average of four or five applicants before he finds someone that he wants to hire. Because the full interview process requires only 5 to 10 minutes per person, Human Resources Specialist Janice Evans and Davis were able to interview between 90 and 100 applicants throughout the day

on June 20. Davis explained that because they decided to also interview applicants in groups, they were able to interview even more applicants than usual. By the end of the day, Davis offered employment to 52 applicants. Davis testified that 90 to 95 percent of the time, an offer of employment is made to an applicant on the same day as the interview. The offer is made before the applicant takes the required ability test and before any reference checks are made. Evans testified that after an applicant is offered employment, the applicant undergoes a physical and drug test. The applicant must also complete orientation before they actually begin to work. If an applicant does not pass the physical or drug test, the offer of employment is rescinded. Davis estimated that there is normally a 25 to 30 percent failure rate for applicants.

Davis testified that the normal entry-level position at the warehouse is part-time order selector. If a full-time opening becomes available, the warehouse manager and the supervisor review the personnel files and productivity of each candidate and select a part-time employee for promotion to fill the opening. Davis explained that seniority is not a requisite and there is no bid or sign-up procedure. Part-time employees are not offered the full-time position; they are simply promoted into the position. With the promotion to full-time employment, the employee receives benefits and an increase in pay. Davis testified that no part-time employee has ever declined the promotion to full-time employment. During the latter part of the morning of June 20, Dickerson gave Davis a list of 25 part-time order selectors who were promoted to full-time positions. As the human resources specialist, Evans updates an employee's personnel profile form to effectuate an employee's promotion from part-time employee to full time. On June 20, Davis gave Evans the list of the 25 part-time employees who were promoted to full time and she made the necessary personnel update. With their promotion on June 20, the employees' raises were effective immediately.[6]

Respondent also engaged Delta Security Service on June 20. A security guard began monitoring the entrance to the facility at approximately 4 p.m. on that same day. There is no dispute that Respondent also deactivated the strikers' badges that allowed them unrestricted access to the facility. Gaston explained that there had been threats from strikers and there was no formal security service other than the temporary guard at the gate. He testified that he deactivated the strikers' access badges because he wanted to control access to the warehouse.

10. Johnson's description of incidents occurring on June 20

Johnson testified that on the morning of June 20, he received a telephone call from Gaston at approximately 8 a.m. Johnson testified that Gaston told him that he (Gaston) had "heard rumors that we had been fired." Johnson testified: "And so when he told me that so I said what you're saying we're not fired, I can come to work and clock in Sunday and go to work?" Johnson asserted that Gaston responded: "Yes, I'm going to leave that up to you."

Gaston testified that while he had not telephoned Johnson on June 20, Johnson called him sometime between 11 a.m. and 12 noon. Gaston recalled that Johnson asked him only two questions during the conversation. When Johnson asked if he were fired. Gaston told him that he was not. When Johnson asked if Gaston were going to lock him out on Sunday, Gaston told him no.

Johnson further testified that after his talking with Gaston, he telephoned Receiving Supervisor Frank Gardner to find out whether or not he was fired. Johnson recalled that he recounted to Gardner all of his conversation with Gaston. Gardner then stated: "Well, if Ben told you that you pretty much can bank on it." Johnson testified that he was on the telephone with Gardner for probably an hour and a half. Johnson further maintained that in his conversation with Gardner, he discussed the strikers' plan to return to work on their next scheduled shift. Johnson alleges that he told Gardner that he was planning to return to work on Sunday.

Gardner testified that he arrived at work on June 20 at approximately 4 a.m. to take care of his receiving responsibilities. He did not recall talking with Johnson on the telephone on June 20. Gardner recalled talking with Johnson during the next week when he asked Johnson if he would be interested in working at Respondent's Damage Relocation Center or Ludlow facility.

11. Complaint paragraph 11

Complaint paragraph 11 alleges that on June 20, 2003, Respondent, acting through Chris Thompson, by telephone, told an employee that another employee was fired because Respondent had seen the other employee on television with other employees who had ceased work concertedly. Terence Harrington testified that he and Production Analyst Chris Thompson had been friends for a year and he telephoned Thompson as a friend between 11 a.m. and 1 p.m. on June 20. Harrington asked Thompson if he were fired. Harrington recalled that Thompson told him that he didn't think that he was fired however; Darry Jackson might be fired because he was seen on the news with the strikers. Harrington asked Thompson for Barry Dickerson's telephone number. When Harrington later spoke with Dickerson, he also asked Dickerson if he were fired. Dickerson told him that he didn't know and he would get back with him.

Thompson explained that as a production analyst, he has neither an office in the warehouse area nor supervision over any employees. He recalled that he worked until approximately 10 p.m. on June 19. When he arrived home approximately 15 minutes later, he did not watch the evening news. On June 20, Harrington telephoned him between 10 a.m. and 12 noon. Harrington began the conversation by asking Thompson what was going on and if he were fired. Thompson told Harrington that he was not and told him that he needed to talk with Barry Dickerson. Thompson also asked Harrington why he had not come into work the day before. Harrington explained that "the guys were in an uproar and talking crazy" and that was why he didn't come in. Thompson recalled that Harrington mentioned something about Darry Jackson and a television program. Because he had not seen the news, Thompson didn't know what

[6] Evans acknowledged that she inadvertently entered June 22 as the effective date of the pay raise for some of the promoted order selectors. She speculated that she may have entered the wrong date on one of the profiles and then fell into a pattern of entering the same wrong date on other employee profile forms.

Harrington was talking about. Several weeks after their conversation however, Thompson saw a tape recording of the news program. Thompson denied that at any time during the conversation, he said anything about Jackson's employment or Jackson's being in the news.

12. The strikers return to the facility

Gaston testified that he was not sure how many of the strikers were originally scheduled to work on Friday and Saturday, however these were typically lighter days. He recalled that by Saturday, he had instructed the security guard to record the name and the time of arrival of any person entering the facility without an identification badge or with an identification badge that did not work. Janice Evans testified that on June 19, Davis and Gaston instructed her to deactivate the strikers' cards that allowed them access to Respondent's facility. Reggie Crawford, Melvin Norris, Steve Lyons, and Leslie Hall were all originally scheduled to work second shift on June 20. When Crawford arrived at the facility around 1:50 p.m., he found that his card wasn't functioning and he used another employee's card to gain access to the facility. He had already clocked in for his shift when Chris Thompson saw him and told him that he was to see Gaston in the conference room. When Melvin Norris and Leslie Hall arrived at the facility at approximately 1:30 p.m., there was no security guard present and they had no difficulty entering the facility. Shortly after entering the warehouse, they were both directed by a supervisor to a meeting in the conference room. Steve Lyons recalled that a security guard was present when he reported for the 2:30 p.m. shift and he too was directed to the conference room. Gaston testified that strikers Elvis Lyon and Will Hampton also came back into the facility on Friday afternoon and they were also included in the conference room meeting. Crawford recalled that both Harry Davis and Barry Dickerson were present in the conference room along with Gaston. Lyons identified only Dickerson and Gaston present in the conference room. There is no dispute that Gaston told the employees that they had been permanently replaced. Steve Lyons asked if they were fired and Gaston told them that they were not. He asked them if they were interested in part-time work in the future if the work became available. Leslie Hall, Steve Lyons, Elvis Lyons, and Melvin Norris told Gaston that they were not interested. Crawford however, told Gaston that he would be interested. Crawford could not recall Hampton's response. Melvin Norris testified that Gaston mentioned that it might be as long as 2 to 3 years before the work would be available. Crawford testified that Gaston did not tell them how long it might be before the work was available.

Respondent's guard roster for June 21 reflects that strikers Jerry Williams, Latracy Jackson, Marchello Young, Larnelle Bush, Chauncey Hawkins, Antonio Jones, William Hearon, and Kelvin Cooks returned to the facility on June 21 at varying times between 1:20 and 2:10 p.m. Williams, Hawkins, Jackson, Young, Cooks, and Bush testified that when they attempted to enter the gate from the parking lot, they were directed by the security guard to meet with Gaston in the conference room. Jackson recalled that either Dickerson or Davis or both were present with Gaston in the conference room. Hawkins and Williams recalled David Campbell's presence. The strikers testified that Gaston told them that they were permanently replaced and were not fired. As he had done the day before, Gaston asked the strikers if they wished to be considered for future employment and he spoke separately with the full-time and the part-time employees. Cooks, Hawkins, and Bush testified that they told Gaston that they would be interested in the future openings.

Respondent's guard roster reflects that Larry Lloyd, Larry Green, Antonio Jones, Louis Toy, Anthony Smith, Darry Jackson, Michael Liddell, Arthur Denton, Carlton Briscoe, Chauncey Hawkins, Elvis Lyons, Irish Johnson, Kelvin Cooks, Kevin Butler, Larnelle Bush, Leon Cain, Richard Howard, Steven Lyons, Terence Harrington, William Hearon, Latracy Jackson, Melvin Jones, Melvin Norris, Richard Taylor, Marchello Young, and Leslie Hall arrived at the facility on June 21 between 11:37 and 11:50 a.m. and all exited the facility at 12 p.m. It is undisputed that Gaston met with them and explained that they had engaged in a wildcat strike and they had been permanently replaced. Denton recalled that he told Gaston that he didn't understand the meaning of permanently replaced. Johnson testified that he brought a tape recorder with him to the meeting in hopes that Gaston would say that they were fired. It is undisputed that Gaston told employees that they were neither fired nor laid off. As he had done on previous days, he asked the employees if they would be interested in coming back if a part-time position became available.

Marchello Young, Chauncey Hawkins, Steven Lyons and Kelvin Cooks apparently reported back to work on June 22 as well as June 21. They did not testify as to whether Gaston made any reference to their second appearance at the facility. Latracy Jackson and Larnelle Busch testified that when they went into the facility again on June 22, Gaston told them that he had already spoken with them on June 21 and they were excused from the meeting.

After hearing Gaston's telephone message on June 21, Melvin Norris reported to work as requested on June 22. Norris testified that he arrived at the facility around 1 p.m.[7] even though Gaston's message had not specified the time that he was to begin work. Seeing other employees going into the conference room, he followed them. He admitted that the security guard did not send him to the conference room. Following the meeting, Norris left the facility. Norris acknowledged that at no time during Gaston's meeting did he ever question why he was included with the other strikers when Gaston had already called him back to work. On cross-examination, Counsel for Respondent asked Norris why he had not later called Gaston to get clarification. Norris responded, "Why should I?"

When Gaston telephoned Hall on Saturday, he told him that a part-time position was available for him if he wanted it. At the time of the walkout, Hall had been working as a part-time order selector since October 30, 2001. Hall accepted the job and reported to work on Sunday as scheduled. On direct examination, Hall testified that when he entered the premises on Sunday, June 22, the security guard sent him to the conference room. On cross-examination however, Hall admitted that when

[7] The guard roster indicates that Norris arrived at the facility at 11:50 a.m.

he initially gave an affidavit to the Board, he did not allege that anyone sent him to the conference room. Hall remained in the conference room during the meeting and then left the facility. He admitted that he never questioned his status as permanently replaced when Gaston had already called him into work. When asked why he did not, he replied that he had not seen any need to do so.

Gaston testified that Norris and Hall came into the conference room with the other strikers although they were both scheduled to report to work on June 22. He dismissed them from the conference and assumed that they were leaving to go to work. They neither reported to work that day nor did they ever contact him to inquire about the jobs that he had offered them.

13. Strikers return to work

Respondent's records reflect that letters offering employment were sent to all 36 individuals considered to be strikers and Irish Johnson was the first striker to return to work on July 13, 2003. Larry Lloyd returned to work on July 20 and Terence Harrington and Michael Liddell returned to work on July 27. Eight strikers returned to work in August and 15 strikers returned to work in October. The remaining eight strikers either did not respond to letters offering employment or declined because of disability or other reasons. Respondent's last letters initially offering employment to strikers were sent on October 9, 2003. Prior to the time that all of the strikers returned to work, a number of the strikers were offered the opportunity to work for a period of time at Respondent's other facilities. Prior to his returning to work at Respondent's Indianola facility, Tamarus Brown worked for approximately 5 weeks at Respondent's Kenosha, Wisconsin facility. Jerry Williams acknowledged that while he did not respond to Respondent's second letter offering employment at the Indianola facility, he did accept an offer to work for approximately a month at Respondent's Kenosha, Wisconsin facility. Larry Green testified that he did not go back to work at Respondent's facility because he found other employment. Arthur Denton testified that after he returned to work at Respondent's facility, he was sent to Respondent's Fort Worth, Texas facility to train order selectors.

III. ANALYSIS AND CONCLUSIONS

A. Prevailing Legal Authority

The Board has long recognized that the right of employees to engage in concerted activities such as an economic strike is protected, inter alia, by Sections 7 and 13 of the Act. *Shop Rite Foods, Inc*., 171 NLRB 1498, 1509 (1968), enfd. 430 F.2d 786 (5th Cir. 1970). If the employer refuses to reinstate striking employees after the conclusion of a strike however, the effect is found to discourage employees from exercising their rights to organize and to strike as guaranteed by the Act and the employer's interference with the exercise of these rights becomes an unfair labor practice. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). One of the business justifications recognized for an employer's failure to reinstate striking employees who have engaged in an economic strike is when the jobs claimed by the strikers are occupied by workers hired as permanent replacement during the strike in order to continue operations. *Fleetwood Trailer Co.*, at 379. It is therefore well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided that their positions have not been filled by permanent replacements. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938). Additionally, the employer has no duty to reinstate strikers unless and until an unconditional offer to return to work from the strike is made. *McAllister Bros*., 312 NLRB 1121, 1123 (1993).

B. When Did the Strikers Make an Unconditional Offer to Return to Work?

General Counsel asserts that the discriminatees struck Respondent's facility for the second shift on June 19, 2003. Based upon this premise, General Counsel argues that the employees returned to work on their next scheduled shift. The evidence reflects that Gaston repeatedly asked the employees to return to work on June 19. When they were finally given a choice of going to work or leaving the premises, the employees chose to leave. There is no evidence that upon their departure, Johnson or any other striker told Respondent that they planned to be absent for only one shift.

General Counsel also argues that the messages left by employees on the company's answering machine reflects their intent to "refrain from working for only a single shift." Respondent's attendance policy provides that if an employee fails to provide proper notification to the appropriate supervisor before the scheduled time to report to work, his absence is counted as an AWOL or absence without leave. Only if the employee can establish after-the-fact to the company's satisfaction that circumstances beyond the employee's control prevented the employee from providing such notification, can the employee avoid being charged with AWOL. In this case, virtually none of the striking employees provided notification of their absence prior to their scheduled starting time. There is no dispute that the scheduled starting time for the order selectors had already passed by the time the employees left the facility. Although employees leaving messages on the answering machine attributed their absences to illness or car troubles, Respondent's managers had just witnessed the employees leaving the facility en masse. While the messages and the walkout may have been incongruous, these telephone messages did not sufficiently communicate the employees' clear intent to return to work.

More importantly however, the employees' later actions in the day further contradicted the strikers' intent to return to work. The tape recording of the 10 p.m. news specifically includes Johnson's statement that the employees were willing to work "as long as" Respondent's system was fair. Reginald Wright, who joined with strikers, stated that they were "tired of getting this stuff" shoved down their throats. Striker Melvin Norris talked about his belief that Respondent was trying to replace full-time employees with part-time employees. Striker Richard Taylor spoke about Respondent's failure to give higher raises. The final statement by an employee on the news segment came from Wright who proclaimed: "If we're fired, I've

still got 40 more guys right here behind my back. If I don't go, they don't go." Based upon his comments during this same news segment, it is apparent that Mayor Marble believed that there were matters to be resolved before the employees returned to work. He told the news reporter: "I've got to try to contact some representatives from Supervalu to see if we can't get this thing to the table and resolve it quickly." The very fact that the Mayor referenced getting the matter to the table evidences his perception that some degree of bargaining or mediating was required. The overall statements by the strikers, the Mayor, and even the news reporters indicated that the strikers were not satisfied with their working conditions and they wanted changes in their hours and pay. Their assertions and conduct were totally inconsistent with an unconditional offer to return to work or indicative of the idea that the employees had struck for only one shift.

The permanent replacement of economic strikers, a substantial and legitimate business justification for refusing to reinstate former strikers, is an affirmative defense and the employer has the burden of proof. *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002). I find that Respondent has met this burden of proof and has demonstrated that it lawfully and permanently replaced the June 19 strikers before there was any unconditional offer to return to work.

Relying upon the testimony of Irish Johnson, General Counsel argues that Johnson made an unconditional offer to return to work when he spoke with Gaston on the morning of June 20. General Counsel further relies upon the testimony of Johnson and other strikers who testified that Johnson was chosen as their spokesperson with the media and Respondent. Johnson testified that when Gaston telephoned him on June 20, Gaston stated that he had "heard rumors" that the strikers had been fired. Johnson alleges that he responded by asking Gaston if he meant that they were not fired and then asking Gaston if he could come to work and clock in on the following Sunday. Johnson alleges that Gaston told him "Yes, I'm going to leave that up to you." By contrast, Gaston testified that he had not telephoned Johnson. He recalled that when Johnson telephoned him, Johnson initially asked if he were fired. When told that he was not, Johnson then asked if Gaston planned to lock him out on Sunday and Gaston confirmed that he would not. Based upon the overall record testimony of these two witnesses, I find Gaston's testimony to be more credible with respect to this conversation. There is no dispute that the day before this conversation, Gaston witnessed a substantial portion of his evening shift employees walking out en masse after his repeated appeals for them to begin work. Respondent then immediately dealt with the challenge of processing orders for a new customer on one of the busiest nights of the week and without the assistance of 36 individuals who were scheduled to work. Based upon the events of the previous day, I find it totally implausible that Gaston would have simply told Johnson that he was free to return to work whenever he wished or to have even implied that Johnson's job was being held for him whenever he wished to return. Johnson's assertion that Gaston mentioned that he had heard rumors that the strikers were fired makes little sense when Gaston was the highest official at the facility and would have had no basis to speculate about rumors with Johnson. If anyone knew the true employment status of these employees, it was Gaston. Additionally, I do not find it plausible that Gaston telephoned Johnson early in the morning of June 20. There is no evidence that Gaston telephoned or attempted to telephone any other employees except those he specifically solicited to return to work. There is no dispute that Gaston telephoned Leslie Hall, Melvin Norris, and Reggie Crawford after the walkout in an attempt to get them back to work. In the midst of what was happening on the morning of June 20, there would have been no reason for Gaston to telephone Johnson merely to speculate about rumors.

Johnson admits that he tape-recorded his meeting with Gaston when he returned to the plant on Sunday, June 22. He testified that he did so because he wanted to get Gaston to state on tape that the employees were fired. While Johnson asserts that he had been selected as the spokesperson for all of the strikers, he admits that he never said anything to Gaston about the June 20 telephone call or Gaston's alleged promise that the employees could return to work on June 22. The obvious questions remain. If Johnson returned to the plant on Sunday with the expectation that he was returning to work as Gaston had promised, why did he bring a tape recorder to capture Gaston's admission that he had been fired? Additionally, why did Johnson not use the tape recording to confront Gaston with his alleged June 20th promise to allow him to return to work? Johnson's actions on June 22 simply do not support his testimony concerning the June 20 conversation with Gaston.

Johnson spoke with both television and newspaper reporters on June 19. He was not sure of the exact dates but recalled that he also spoke with the media again several times after Thursday, June 19. He specifically recalled giving an interview to the newspaper the following Monday. He also recalled that he spoke with the media prior to the strikers meeting with the NAACP on Tuesday. Johnson also testified that the Mayor telephoned him on June 20 and that he later met with the Mayor for approximately 2 hours.

The June 26 newspaper article reflects interviews with both Johnson and Human Resources Director Davis. During his interview, Johnson cites the strikers' five issues that included unfair job expectations, loss of overtime, lack of communication, working conditions, and loss of benefits. During the interview, Johnson explained that when strikers returned to the plant on Sunday, they were told they were permanently replaced and were offered the opportunity to apply for new positions as they became available. Johnson admits that he did not tell the reporter about talking with Gaston on June 20 or tell the reporter that Gaston promised on June 20 that employees could return to their jobs. The record also contains the recordings of three television news segments that were broadcast the week following the strike at Respondent's facility. None of the segments contain any reference to Johnson's alleged conversation with Gaston or Gaston's alleged promise that employees could return to their jobs. Johnson admitted that he never told the television reporters that Gaston or Gardner told him that he could return to work. Although Johnson contends that he spoke for two hours with the Mayor on June 20, the record contains no indication that Johnson shared with the Mayor Gaston's alleged promise that employees could return to their jobs. In

fact, in one of the Mayor's interviews that aired after Johnson talked with Gaston and with the Mayor, the Mayor stated:

> It is determined that there is very little that we can do from the perspective of the city and the county at this time other than support efforts and initiatives; that's to try to get the parties to the bargaining table and resolve this matter at the table peacefully without interruption of services here at this plant, or without threat to any closure of this plant.

In response to the statement by the Mayor, the news reporter adds:

> Mayor Marble says the only way for the city to step in is if Supervalu or the employees who walked off the job request mediation and both parties have to be in agreement.

Additionally, I find Johnson's testimony incredible with respect to his alleged conversation with supervisor Gardner. Johnson alleges that when he spoke with Gardner for an hour and a half on the morning of June 20, he told Gardner that the strikers planned to return to work on their next scheduled shift. Johnson's testimony is lacking in credibility for two reasons. Firstly, Johnson alleges that he telephoned Gardner at the plant early in the morning on June 20. Based upon the increased workload resulting from the walkout the day before, it is totally incredible that Gardner could have taken the time to chat with an employee by telephone for an hour and a half. Secondly, Johnson's assertion that he told Gardner that strikers were returning on their next scheduled shift appears totally lacking in candor. As with other portions of Johnson's testimony, this additional assertion appears as an afterthought and an attempt to shore up his testimony. While Johnson alleges that he told Gardner that the strikers were returning to work on their next scheduled work day, there is no evidence that Johnson or any other striker told the news media or even Gaston of this plan.

Accordingly, there is no credible record evidence that Johnson or any other striker communicated the strikers' intent to return to work and there is no evidence that the strikers made an unconditional offer to return to work prior to Respondent's hiring of permanent replacements.

The record contains documentation completed by the striker replacements on June 20. The records show that between 8:07 a.m. and 8:34 p.m. on June 20, 52 applicants completed Acknowledge of Agreement forms. By signing the form, the applicant acknowledged his understanding that he was hired as a permanent replacement for "people that refused to do their job." Each applicant further acknowledged his understanding that his continued employment with Respondent was contingent upon passing the ability test, drug screen test, and the physical. The determination of the status of replacement employees as either temporary or permanent is based on the mutual understanding between the employer and the replacements. *Belknab, Inc. v. Hale*, 463 U.S. 491 (1983); *Harvey Mfg.*, 309 NLRB 465 (1992). Citing *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), counsel for the General Counsel argues that absent evidence of a mutual understanding, the employers' own intent to employ the replacements permanently is insufficient. In a more recent case, the Board affirmed the administrative law judge in finding that an employer's ambiguous statement to striker replacements may not represent a "mutual understanding" between the employer and the replacement. *Capehorn Industries*, 336 NLRB 364, 365 (2001). I find no ambiguity in the acknowledgement of agreement forms signed by the employees who were hired on June 20. Accordingly, there is nothing in the record to indicate that there was a "lack of understanding" between Respondent and the replacements concerning the nature or permanency of their employment. Accordingly, there is no record evidence that the individuals hired on June 20 were hired as anything other than permanent replacements for the striking employees.

The Board normally regards the employer's hiring commitment as effectuating the permanent replacement of a striker even though the striker may request reinstatement before the replacement actually begins to work. *Home Insulation Service*, 255 NLRB 311, 312 fn. 9 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981); *Superior National Bank*, 246 NLRB 721 (1979). Thus, even though the individuals hired as permanent replacements on June 20 did not actually begin their work until after June 22, their status as permanent replacements was effective as of June 20.

Counsel for the General Counsel also argues that Respondent's promotion of part-time employees to full-time employees did not constitute a "mutual understanding between the employer and the replacements that the nature of their employment was permanent." Counsel for the General Counsel argues that while part-time employees were promoted on June 20, there is no evidence that Respondent promised them that their promotion was permanent and no evidence that the promoted employees understood that their promotion was permanent. I do not find this argument persuasive. The record is without dispute that Respondent's practice is to hire order selectors as part-time employees and then promote them into full-time positions as the employees perform and as the jobs become available. There is no evidence that when the order selectors are initially hired as part-time employees, they are hired as anything other than permanent employees. While they may not have the hours and the benefits of full-time employees, there is no evidence that they are hired as temporary. There is no bid system and management, without consultation or input from the employee, routinely makes the promotions from part-time to full-time. Davis testified without contradiction that no part-time employee has ever declined the promotion to full-time employment with the accompanying pay raise and benefits. Based upon the record evidence, including the evidence of Respondent's undisputed past practice with promotions; Respondent's promotions of the 25 part-time employees became effective when management selected the employees for promotion. The effectiveness of these promotions did not hinge upon notification to the employees or Evans's completing the routine paperwork and entering the personnel changes into the computer base. Accordingly, I do not find that Respondent has failed to show that its June 20th promotions were anything less than permanent.

C. Whether Respondent's Actions Prolonged the Strike

Paragraph 8(a) of the complaint alleges that from June 20, 2003 until varying listed dates in July and August, Respondent

failed and refused to reinstate eight named strikers to their former positions of employment. Paragraph 8(b) alleges that since on or about June 20, 2003, Respondent has failed and refused to reinstate 25 named strikers to their former positions of employment. Prior to presenting any proof in this matter, General Counsel moved to amend the complaint[8] by adding three additional employees to the list of strikers identified in complaint paragraphs 7 and 8(b). Additionally, General Counsel's motion included the addition of paragraph 8(c) with the following wording:

> If it is determined that the strike was not concluded on June 19, 2003, then the strike described above in paragraph 6 was prolonged by the unfair labor practices of Respondent described above in paragraphs 8(a) and (b).

Therefore, based upon the March 10, 2004, complaint amendment, General Counsel further submits that Respondent's failure and refusal to reinstate the strikers on June 20 prolonged the strike, which would have otherwise ended on June 19. In her brief, Counsel for the General Counsel argues that in the event that it is determined that the economic strike had not concluded on June 20, the strike was converted to an unfair labor practice strike by Respondent's effectively discharging seven strikers. Counsel for the General Counsel argues that Respondent effectively discharged full-time strikers Elvis Lyons and Steven Lyons and part-time strikers Richard Crawford and Will Hampton on Friday, June 20 by telling them that they had been permanently replaced. I note that while General Counsel argues that Will Hampton was a part-time employee at the time of the strike, he is not designated as one of the part-time strikers on General Counsel's Exhibit 3. The record also reflects that striker Reggie Crawford testified that he returned to Respondent's facility on June 20 and striker Richard Howard testified that he returned on June 22. General Counsel also argues that part-time strikers Leslie Hall and Melvin Norris were discharged on Friday, June 20 by Respondent's telling them that they were no longer needed. Finally, General Counsel asserts that Respondent discharged full-time striker Johnny Watkins by telling him that he was no longer employed. I do not find sufficient record evidence to support a finding that Respondent discharged these seven employees as alleged.

As discussed above, the total record evidence reflects that on June 20, Respondent promoted 25 part-time employees to full-time positions and hired 52 permanent replacements to fill the strikers' positions. There is no credible evidence to demonstrate that the strikers made unconditional offers to return to work prior to Respondent's hiring of the permanent replacements. In reaching this finding I have nevertheless considered the record evidence that six strikers returned to the facility on June 20 and met with Gaston. Employees Reggie Crawford, Leslie Hall, Melvin Norris, and Steve Lyons all testified that they reported to the facility for their scheduled shift on June 20. Gaston recalled that Elvis Lyons and Will Hampton also returned to the facility on June 20. After their arrival at the facility, the six employees met with Gaston in the conference room and he explained to them that they were permanently replaced. As of the time that Gaston met with these employees, Respondent had already promoted 25 part-time employees to full-time positions and offered employment to 13 other individuals. It is also undisputed that the following day, Gaston telephoned both Hall and Norris and offered them the opportunity to return to their former jobs on Sunday, June 22. While Gaston also attempted to reach Crawford on Saturday to give the same offer, he was unable to reach him because Crawford's telephone number was incorrect in the personnel records. As discussed above, both Hall and Norris returned to the facility as requested on June 22 and inadvertently congregated with other strikers who were told that they were permanently replaced. Rather than reporting to work as scheduled, they left the facility with the other strikers. Thus, the evidence reflects that Respondent offered reinstatement to Norris and Hall and attempted to offer reinstatement to Crawford as well.[9]

Accordingly, while seven of the June 19 strikers returned to the facility on June 20, the overall evidence demonstrates that Respondent did not unlawfully fail and refuse to offer these strikers reinstatement to their former positions. In her brief, counsel for the General Counsel argues that at the time the seven strikers returned to the facility on June 20, Respondent had not completed all the paperwork for the promotion of the 25 part-time employees to full-time employment. As discussed above, I find the promotions effective prior to the time when these seven employees returned to the facility. General Counsel also acknowledges that as of the time these seven strikers returned to the facility, Respondent had already hired 13 new employees as permanent replacements. Counsel for the General Counsel argues however, that there were still 39 vacant slots remaining at the time of their return. While the evidence reflects that Respondent hired 52 new employees on June 20, I don't find counsel's argument to be compelling. Based upon General Counsel's own exhibit, there appeared to be a total of only 36 strikers. The total record evidence reflects that as of the time that the seven strikers returned to the facility on June 20, Respondent had already promoted 25 part-time employees to full-time positions and had offered employment as permanent replacements to 13 new hires. While Respondent continued to interview and ultimately offered part-time employment to 39 more individuals, there were nevertheless only 36 striker positions to be filled. These positions were already filled by the time these seven individuals returned to Respondent's faculty. With respect to Hall and Norris, Respondent later offered reinstatement to them on June 21.

Johnny Watkins arrived at Respondent's facility at approximately 2:50 p.m. on June 19, to report for his scheduled shift at 3 p.m. He arrived at the facility near the same time as Larry Green and Willie Young. Before reaching the gate, he saw employees leaving the facility. Both he and Green testified that

[8] The motion was granted on March 10, 2004.

[9] In his brief, counsel for Respondent concedes that it is possible that part-time pay may be owed to these three part-time employees for one day as they were offered the opportunity Saturday to return to work Sunday, June 22 and they did not do so. Respondent further argues however, that while it is possible that these part-time employees may be owed back pay for the one day before they were called to return to work, that back pay cuts off as of Sunday when they left the premises of their own accord without clocking in and resuming work.

all three employees returned to their vehicles without attempting to enter the facility. Watkins testified that he went to the park with the employees who had walked out of the facility on June 19. Watkins was next scheduled to work on Friday, June 20 and he returned to the facility at approximately 3:45 p.m. Finding that his badge did not function to give him access to the facility, he left his car in the parking lot and attempted to enter the premises through the front gate. Using the intercom at the front gate, Watkins told the operator that he was scheduled to work at 4 p.m. and his card was not working to let him into the facility. Watkins testified that the operator told him that he was no longer employed. Watkins asked to speak with the plant manager and the operator told him that he was unavailable at that time. While Watkins left the premises, he telephoned the plant again and asked to speak with Barry Dickerson. He told Dickerson that he had not been able to enter the premises because his card had not worked. Watkins testified on direct examination that Dickerson told him that since he had been a part of the walkout, he was no longer employed. Watkins recalled that he questioned Dickerson how he could be considered a part of the walkout when he had neither clocked in nor even entered the gate the previous day. Watkins further testified that Dickerson explained to him that because he was part of the walkout, he had been permanently replaced. Watkins also recalled that Dickerson told him that when a part-time position became available for him, Dickerson would call him. On cross-examination, Watkins admitted that during the conversation, Dickerson never told him that he had lost his employment. While Watkins asserted that Dickerson told him that he was no longer employed, Watkins admitted that he did not include this allegation in his July 10, 2003 affidavit to the Board agent. General Counsel argues that Respondent's failure to call Dickerson to testify raises an inference that Dickerson would not contradict Watkins' testimony and that his testimony would have been adverse to Respondent. I do not agree with counsel's assertion that Watkins's unrebutted testimony supports a finding that Respondent "effectively discharged" Watkins or any other striker on June 20. While Watkins contends that Dickerson told him that he was no longer employed, he admitted that he had not included this statement in his sworn affidavit given 3 weeks after the occurrence. Further Watkins admitted that Dickerson told him that he had been permanently replaced and would be recalled when a part-time position became available. I don't find Watkins's testimony credible or sufficient to establish that Respondent effectively discharged Watkins.[10]

Finding that Respondent did not unlawfully fail or refuse to reinstate the strikers, there is no basis to conclude that Respondent's actions played any part in prolonging the strike as General Counsel alleges. The Board has consistently held that an employer's unfair labor practices during an economic strike do not automatically convert it into an unfair labor practice strike. Such conversation would be found only when there is proof of a causal relationship between the unfair labor practice and the prolongation of the strike. *Anchor Rome Mills, Inc*., 86 NLRB 1120, 1122 (1949). A strike that begins as a dispute over economic issues may be converted to an unfair labor practice strike if the General Counsel establishes that the "unlawful conduct was a factor (not necessarily the sole or predominate one) that caused a prolongation of the work stoppage." *C-Line Express*, 292 NLRB 638 (1989), enfd. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). In determining whether a strike is converted from an economic strike to an unfair labor practice strike, the Board considers both subjective and objective evidence. *Titan Tire Corp*., 333 NLRB 1156 (2001). In discussing the analysis of subjective and objective evidence in its decision in *Titan Tire Corp*., the Board reiterated[11] the analysis in *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980):

> Applying objective criteria, the Board and reviewing court need properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice.

In *Gloversville Embossing Corp*., 297 NLRB 182, 183 (1989), as cited by counsel for the General Counsel in her brief, the Board found objective evidence that an economic strike was converted to an unfair labor practice strike. In that case, the employer's plant manager and chief corporate officer told exiting strikers that anyone who left the mill would stay out of the mill and the employer would never hire them back. The next day, the employer followed with a letter informing the strikers that they would be terminated if they did not return to work. The Board found that such unlawful discharges "by their very nature have a reasonable tendency to prolong a strike and therefore afford a sufficient basis for finding a conversion to an unfair labor practice strike." Id at 182.

As discussed above, I do not find sufficient evidence to demonstrate that the Respondent terminated the employees who struck on June 19. The credible evidence reflects that by the time that the strikers returned to work and made unconditional offers to return to work, Respondent had already hired permanent replacements. Thus, unlike the circumstances found in *Gloversville Embossing Corp*., there are no unlawful discharges or objective evidence of other unfair labor practices that would have tended to prolong the economic strike.

In looking to whether there is subjective evidence that a strike has been converted to an unfair labor practice strike, the Board has recognized that proof of strikers' motivations is not limited to evidence that the strikers specifically discussed the unfair labor practices as reasons for continuing the strike. *F. L. Thorpe & Co., Inc*., 315 NLRB 147, 149 (1994). Additionally, the Board has not required that a conversion will only be found where employees as a group expressly vote or decide to continue on strike because of unfair labor practices. Ibid at 149. In some instances the Board has inferred a change in the strikers' subjective motivations where there is evidence that the unfair labor practices "caused consternation" among the striking em-

[10] I note also that there was nothing in the record to establish that the plant operator was acting as Respondent's agent.

[11] Id. at 1157.

ployees. *Chicago Beef Co*., 298 NLRB 1039, 1040 (1990), enfd. mem. 944 F. 2d 905 (6th Cir. 1991), *Gaywood Mfg., Co*., 299 NLRB 697, 700 (1990). In the instant case however, there is neither direct evidence that there was a change in the strikers' subjective motivations nor is there evidence upon which an inference may be drawn.

Johnson testified that when he spoke with the newspaper reporter the week following the walkout, he identified the five issues that led the employees to walkout on June 19. There is no record evidence that at any time after June 20, Johnson or any other striker identified to the news media or Respondent any other issues other than those initially discussed by strikers on June 19. There is thus no evidence of any change in the strikers' motivation following Respondent's failure to reinstate the seven employees who appeared at the facility on June 20.

Counsel for the General Counsel submits that the economic strike was converted to an unfair labor practice strike on June 20, when Respondent failed to reinstatement the seven strikers who reported for work. Having found that Respondent permanently replaced the strikers prior to any strikers' return to work on June 20, and at a time when the strike was purely economic in character, any conversion of the strike to an unfair labor practice strike would be without effect insofar as the reinstatement rights of the strikers are concerned. Even assuming there was a conversion, the reinstatement rights were fixed at the time of replacement and any subsequent conversion would only entitle the strikers, under *Laidlaw Corp*., 171 NLRB 1366 (1968) to reinstatement as their former jobs became available after their unconditional offer to return to work.

D. The 8(a)(1) Allegations

The initial complaint included three separate incidents alleged as independent violations of Section 8(a)(1) of the Act. As discussed above, no proof was presented in support of one allegation and the complaint paragraph was dismissed upon Respondent's motion. The remaining two allegations involved separate telephone statements made by Gaston and Thompson. In both incidents, Respondent's representatives are alleged to have threatened employees with termination because they participated in the June 19 strike. It is well established that threats of discharge made to economic strikers violate Section 8(a)(1) of the Act. See *Super Glass Corp*., 314 NLRB 596, 597 (1994), *Gloversville Embossing Corp*., 297 NLRB 182, 183, fn. 5 (1989). As discussed below, I do not find the evidence to support a violation with respect to either conversation.

1. Gaston's June 19 conversation with Green

Paragraph 10 of the complaint alleges that during a telephone conversation on June 19, Gaston told Larry Green that his job was in jeopardy if he participated in the strike. Green did not participate in the walkout and simply refrained from entering the facility on June 19 when he saw the strikers leaving the facility as a group. It is undisputed that Gaston telephoned Green to appeal to him to report to work and Green refused to do so. Green testified that Gaston told him that if he did not come in to work he could jeopardize his job and Gaston would consider him as one of the employees who had walked off their jobs. General Counsel presented employees Harrington and Jackson to corroborate Green's testimony. Both employees testified that they were present with Green during the telephone conversation. On direct examination, Jackson testified that he heard Green state to Gaston: "How can you say that I've put my job in jeopardy when I went through procedures?" On cross-examination, Jackson admitted that when he initially gave his affidavit to the Board, he did not assert that Green repeated the word "jeopardy." On direct examination, Harrington testified that Green reported to him that Gaston stated: "You've been here a lot of years. We hate to lose you like this." On cross-examination, Harrington admitted that Green had not said anything about his "job in jeopardy." Gaston testified that when he spoke with Green he told him that if he did not come in to work, he (Gaston) would have to consider him as the others. Gaston denies that he told Green that his job would be in jeopardy if he didn't come in to work.

Gaston denies that he used the word "jeopardy" and General Counsel's witnesses are neither in agreement nor consistent in their recall of the use of the word "jeopardy." While Gaston does not allege that he told Green that he would be permanently replaced, all witnesses agree that Gaston cautioned Green that if he did not report to work as scheduled, he would be treated as a striker. There is no allegation that Gaston told Green that he would be fired or that his employment would be terminated if he did not report to work. Based upon all of the testimony concerning this allegation, I find no credible evidence to establish that Gaston threatened Green with job loss if he participated in the strike. Crediting the testimony of Gaston, I find that Gaston did not violated Section 8(a)(1) of the Act as alleged when he informed Green that he would be considered as a striker if he did not report to work as requested.

2. Thompson's conversation with Harrington

Complaint paragraph 11 alleges that on June 20, Thompson told employee Harrington that employee Darry Jackson might be fired because he was seen on the news with the strikers. There is no dispute that Thompson and Harrington were personal friends at the time of the June 20 telephone conversation. Thompson denied the alleged statement and testified that when he spoke with Harrington on June 20, he had not even seen the previous evening's news program concerning the strikers. Both Thompson and Harrington testified that Harrington initiated the telephone conversation and asked Thompson if he were fired. There is no dispute that Thompson told Harrington that he didn't think that Harrington was fired. Harrington goes on to add however, that Thompson opined that Darry Jackson might be fired because he was seen on the news with the strikers. I do not find Harrington's additional allegation to be credible. Firstly, he offered no explanation as to how Jackson's name came up during the conversation nor did he identify why only Jackson would have been targeted for termination. While the tape recording of the June 19 news segment includes on-air statements by four different strikers, Darry Jackson was not one of those strikers. There is nothing in the record to show what prominence, if any, that Jackson had on the news segment. Neither Harrington nor any other striker testified concerning Jackson's prominence or visibility among the strikers shown during the June 19 segment. Accordingly, I find Thompson's

alleged threat concerning Jackson to be less than plausible. Crediting the testimony of Thompson, I do not find that Respondent unlawfully threatened discharge as alleged in complaint paragraph 11.

D. Whether Respondent's Decision to Permanently Replace Strikers Was Unlawfully Motivated

Counsel for the General Counsel argues that Respondent's reaction to the strike "leads to the inexorable conclusion that it had no intention of allowing strikers to return to work, if they did not do so on June 19." In citing *Chocto Maid Farms*, 308 NLRB 521, 528 (1992), Counsel agrees however, that an employer who establishes that it has hired permanent replacements to fill positions left vacant by the strikers will be deemed to have presented a legitimate and substantial business justification without further scrutiny. Counsel for the General Counsel acknowledges in her brief that the Board has recognized that an employer has a legal right to replace economic strikers at will and has held that, ordinarily, the employer's motivation for hiring replacements is immaterial, unless there is evidence of an "independent unlawful purpose." *Hot Shoppes*, 146 NLRB 802, 805 (1964).

As discussed above in this decision, the record contains credible evidence that Respondent intended to, and did in fact, hire permanent replacements for the strikers before the strikers made unconditional offers to return to work. There was no persuasive evidence that Respondent, in hiring replacements, acted contrary to its usual employment practices or demonstrated any intent not to hire legitimate permanent replacements.

The total record evidence reflects that at the time of the walkout, there were 25 qualified part-time employees who were waiting for promotion to full-time status. Because the local news media gave the strike extensive coverage, applicants for permanent replacement positions were immediately informed of the strike and took advantage of the opportunity to apply for the positions. Accordingly, Respondent was able to immediately fill the positions left by the strikers on June 19. Respondent's efficiency and speed in doing so does not demonstrate an independent unlawful motive. I also note that there is no evidence that Respondent delayed in offering jobs to the strikers when positions became open. Additionally, there is no dispute that Respondent made interim employment available to some of the strikers at Respondent's other facilities while the strikers were waiting to return to the Indianola facility. Such actions are not illustrative of an unlawful motive to deny employment to strikers because they engaged in protected concerted activity.

E. Summary of Findings

Based upon undisputed record evidence, as well as my conclusions concerning the credibility of the witnesses, I find that Respondent did not unlawfully fail and refuse to reinstate striking employees in violation of Section 8(a)(1) of the Act. Additionally, I do not find that Respondent told employees that their jobs were in jeopardy or that employees were fired because they participated in a strike. Having found that Respondent did not violate Section 8(a)(1) as alleged, I recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Supervalu, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not engage in conduct violative of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 28, 2004

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.